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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 892

RICHARD WOODS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

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APPENDIX

Opinion of Supreme Court of Illinois Sought To Be Reviewed 1a

(Petitioner has furnished nine copies of the printed record used in the Supreme Court of Illinois)

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Your petitioner, Richard Woods, a citizen of the United States of America and the State of Illinois, residing at Chicago in Cook County, prays that this Court issue a Writ of Certiorari to review a judgment of the Supreme Court of Illinois affirming three judgments of the Criminal Court of Cook County, Illinois, that he is guilty of crimes of assault with intent to rob and of two robberies. Petitioner further prays that the judgment of the Supreme Court of Illinois may be reversed.

A. REFERENCE TO OFFICIAL REPORT OF OPINION IN COURT BELOW.

The Opinion in the Court below is reported at 23 Ill. 2d 471 and 179 N.E. 2d 11.

B. STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The Opinion of the court below affirming the trial court was filed November 30, 1961.

(ii) A Petition for Rehearing was filed on December 14, 1961 and denied by the court below on January 22, 1962.

(iii) The statutory provisions conferring jurisdiction upon this Court to review the judgment of the court below by Writ of Certiorari are Sections 2101 (C), Title 28, U. S. Code Annotated and Section 1257, Title 28, U. S. Code Annotated. The particular portion of the aforesaid Section 1257 under which this Court's jurisdiction is invoked is as follows:

> "* * * Where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

The rules of this Court under which this petition lies and is formulated are Rule 19, providing for certiorari to State Courts where the procedure used and sanctioned so departs from the usual course of judicial proceedings as to require the exercise of the power of supervision of this court and where the particular problem involving constitutionality of the procedure used has not been decided by this court; Rule 22 allowing petition to review judgment of State Courts within 90 days; and Rule 23, prescribing form and contents of petition.

Jurisdiction of this Court is also invoked under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the decisions of this Court defining and exercising its power thereunder to enforce fair procedures in State criminal proceedings.

C. QUESTIONS PRESENTED FOR REVIEW.

1. Does the trial of two or more wholly unrelated and disassociated felony cases at the same time, in admitted violation of a cardinal principle of State law prohibiting such procedure, violate the defendant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is a procedure in a criminal case where, at the State's election, the trial of one felony is begun and testimony and evidence received, and where that cause is then recessed at the court's sole instance and the trials of three unrelated felonies then commenced and concluded before him, and where thereupon the trial of the case first begun is resumed and concluded, and all four cases thereupon disposed of together, unfair to the defendant; and, if it is unfair, is that degree of unfairness present that is prohibited by the due process clause of the Fourteenth Amendment?

3. If the trial of a defendant in a criminal case upon disassociated felonies at the same time violates his right guaranteed to him by the Fourteenth Amendment to the United States Constitution, then can this right be deemed to have been waived by the mere omission of his counsel to object to the illegal procedure so as to justify affirmance of the judgments of conviction on review?

4. Can a defendant's lawyer in a criminal case waive defendant's right to a fair trial according to fair and traditional trial procedures?

5. Is a trial, conducted contrary to procedures traditionally deemed necessary to a fair trial, rendered fair because defendant's lawyer failed to object to the Trial Judge's defection?, and does the want of objection thereto satisfy the requirement of the Due Process Clause of the Fourteenth Amendment?

6. What is the duty of a trial judge to protect the constitutional rights of a defendant in a criminal proceeding before him?, and to what extent is his obligation, if any, relieved by want of objection by defense counsel?

7. Can a defendant in a criminal proceeding waive a procedural safeguard of due process?, or Can any waiver of a defendant be deemed effectual that goes so far as to deny him due process?

D. CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

Amendment XIV to the Constitution of the United States, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. FACTS IN THE CASE MATERIAL TO THE QUESTIONS PRESENTED.

On November 22, 1960, in the Criminal Court of Cook County, Illinois, petitioner stood indicted in four separate cases, one, Indictment No. 60-2405, charging that on July 13, 1960, he had assaulted one Linda Anderson with intent to rob her; two, Indictment No. 60-2406, charging that he had, on July 13, 1960, robbed one Johnny Mac Ward of sixty cents; three, Indictment No. 60-2407, charging that he had, on July 13, 1960, robbed one Carmelita Murphy of one watch of the value of $15.10; and four, Indictment No. 60-2408, charging that he had, on June 30, 1960, raped one Judith Birts. All the aforesaid cases were called to trial on said November 22, 1960, at the same time before the same Judge of the Criminal Court (the Honorable Joseph J. Drucker), and the State's Attorney appearing for the people of the State of Illinois in answer to the Court's query, announced that he would proceed upon the rape indictment, No. 60-2408. Petitioner waived trial by jury and testimony was taken in the said rape case from the complaining witness, Judith Birts, her husband, Albert Birts and a police officer. At this point, the court recessed the case until the afternoon of the same day and at the opening of court that afternoon, the State rested its case and petitioner proceeded with his defense. Testimony for defendant was received from four character witnesses and from petitioner's brother, the said brother being an alibi witness. At this point, the court made the following statement:

> "The Court: Recess on this, call 405. That is assault to commit robbery. Is the complainant here? Take 2405 first." (Abstract 12, 13).

The court then proceeded to receive evidence in case No. 60-2405 (attempt to rob Inola Anderson on July 13, 1960), and when this was done, the court said,

"Show trial commenced and continued. No. 60-2406." (Abstract 15)

The court then proceeded to receive evidence in case No. 60-2406 (robbery of Johnny Mae Ward on July 13, 1960), and when this was done, the court said,

"Show trial commenced and continued. Now 60-2407." (Abstract 18)

The court then proceeded to receive evidence in cause No. 60-2407 (robbery of Carmelita Murphy on July 13, 1960), and when this was done, the court stated that the record should show that trial had been commenced and continued in all three of these cases and then stated,

"Continue in 60-2408." (Abstract 19)

All of the material evidence in the robbery cases was received by the court in the form of oral stipulations between counsel of what the complaining witnesses would testify to if they had been called to testify. All complaining witnesses were present in court. Petitioner had entered pleas of not guilty to all of the indictments.

Immediately thereupon, the court continued to hear evidence in the rape case, 60-2408, receiving some testimony in that case concerning matters pertaining to the disassociated robbery cases (Abstract 23, 27).

The court found the petitioner Not Guilty in the rape case and found him guilty in the robbery cases and sentenced him to concurrent terms of 1 to 10 years in all of them (Abstract 28).

Petitioner sued out a Writ of Error in the Supreme Court of Illinois setting forth in his Brief, among other things, that trial for disassociated felonies at the same time, the interminglingg of testimony concerning one with that of the others, the disposition of all of the cases at the same time, constituted reversible error and that this procedure necessarily rendered his trial unfair (Sup. Ct. Record 5). Among the Authorities cited in support of this contention was the case of the *People* v. *Stingley*, 414 Ill. 398 and the case therein cited, *People* v. *Wolf*, 358 Ill. 334.

The People answered petitioner's point in their brief in the Illinois Supreme Court, saying that he had, through competent counsel of his own choice, been responsible for the procedure followed in the trial of four separate and distinct indictments at the same time (Sup. Ct. Record 7).

The Illinois Supreme Court, in its judgment affirming the trial court, said, in effect, that although defendant had undoubtedly been tried upon disconnected and disassociated felonies at the same time contrary to an unquestioned principle of law (*People* v. *Stingley*, 414 Ill. 398 and *People* v. *Wolf*, 358 Ill. 334 being cited by the court as authority), the court of review would not consider the question where no objection to the procedure was made in the trial court. (Appendix 2a)

In his Petition for Rehearing, petitioner argued that the authorities cited by the Illinois Supreme Court in its opinion in support of its above holding, did not justify the holding, that the trial court owed a duty toward the defendant in a criminal case before it to conduct the proceedings in a manner preserving to him his rights guaranteed by the Illinois and the Federal Constitutions, and

that the effect of its opinion was to condone a deprivation of a defendant's liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article 2, section 2 of the Illinois Constitution, on the bare premise and for the sole reason that defendant's trial lawyer had omitted to object to procedure violative of a cardinal principle of Illinois law, that is, that a defendant could not be tried for two disassociated felonies at the same time (Sup. Ct. Record 14).

The Illinois Supreme Court denied the Petition for Rehearing on January 22, 1962, and subsequently stayed its Mandate to the Criminal Court of Cook County to and including April 15, 1962, as aforesaid. The mandate has subsequently been stayed until further order of the court.

THE RAISING OF THE FEDERAL QUESTION IN THE COURTS BELOW.

The Federal question sought to be reviewed is whether or not the procedure of the trial court was so unfair and violative of traditional procedures in criminal cases safeguarding fairness to defendants that it may be said the procedure constituted State action depriving the defendant of due process guaranteed by the Fourteenth Amendment.

The question was not directly and expressly raised in the Criminal Court of Cook County except by general motion for new trial and general motion in arrest of judgment, both of which were denied.

In the Supreme Court of Illinois, though not expressly raised with reference to the Fourteenth Amendment, the federal question was raised as follows:

The trial of defendant for disassociated felonies at the same time, the intermingling of testimony concerning one with that of the others, the disposition of them all at the same time, was error of highly prejudicial and reversible nature, and rendered defendant's trials necessarily improper and unfair. (Page 13 of the Brief in the Supreme Court of Illinois included in Transcript of Record of the Supreme Court filed herewith.)

In his Petition for Rehearing in the Supreme Court of Illinois, petitioner raised the federal question involved as follows:

The Court has overlooked the grave danger existing in the proposition that a trial court has no duty to conduct proceedings before him according to the provisions of the law and of the State and Federal Constitutions, unless the defendant's lawyer objects to the court's own decision to

violate or ignore these provisions. (Page 5 in Petition for Rehearing filed by petitioner in the Supreme Court of Illinois included in Transcript of Record of the Supreme Court filed herewith.)

The court has overlooked the meaning and effect of its decision that a lawyer can by omission waive his client's right to procedural and substantive due process as guaranteed the client by the 5th and 14th amendments to the United States Constitution and Article 2 sec. 2 of the Illinois Constitution. (Page 6 in Petition for Rehearing filed by petitioner in Illinois Supreme Court in Transcript in Supreme Court Record filed herewith.)

Before the filing of the said Petition for Rehearing, the Illinois Supreme Court had, without direct reference to the Due Process Clause of the Fourteenth Amendment, ruled that the procedure at the defendant's trial was fair. (Pages 2a and 3a of Appendix annexed hereto.)

It thus necessarily concluded both in its opinion and its denial of defendant's Petition for Rehearing, that the procedure complained of herein was not so unfair as to constitute a denial of due process guaranteed by the Fourteenth Amendment.

F. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The law of every jurisdiction in the United States, including Illinois and Federal jurisdictions grants to defendant an absolute right not to be tried upon unrelated and disconnected felonies at the same time (23 C.J.S. 677 *et seq.*, Sec. 931). In rare instances a legislature has authorized trial of several different felonies at the same time but only in defined situations where it appears defendant would not be prejudiced thereby.

Pursuant to Supreme Court Rule 19, the reason the Writ prayed should be allowed by this Court is that the trial court "so far departed from the accepted and usual course of judicial proceedings", and the Supreme Court of Illinois so far sanctioned such a departure by the lower court as to call for exercise of the power of supervision of this Court pursuant to the Fourteenth Amendment to the Constitution.

While perhaps not as dramatic as, and certainly more insidious than the procedural departure of the Michigan Court in *In Re Marchisou, et al.*, (Mich. 1955), 75 S. Ct. 623, 349 U.S. 133, 99 L. Ed. 942, the departure of the courts below in this case presents the same question raised in *Marchison*, that is, whether the proceedings below were conducted in accordance with the due process requirement of fair trial by an impartial tribunal in criminal cases. The problem of trial of unrelated felonies in one proceeding has concerned the courts of many state jurisdictions. (23 C.J.S. 677, *et seq.* Sec. 931). Whether or not such procedure violates due process should be decided and settled by this Court.

In the case at bar the manifest unfairness of intermingling a trial of a charge of rape of a woman where the State's testimony was also that she had been molested and robbed (Abstract 7-8), with the trial of unrelated and disassociated charges, robbery of three different women alleged to have been committed 13 days before the date of the alleged rape, and also where the evidence showed molestation of the women, is apparent. The law of Illinois prohibiting such procedure is a necessary procedural safeguard to guarantee the fairness in criminal proceedings required by the due process clause of the Fourteenth Amendment to the United States Constitution as well as the provisions of its own Constitution.

The opinion of the Illinois Supreme Court in the case at bar does not question the principle of law that the procedure complained of herein was erroneous, but refuses to review it and to reverse the convictions because trial counsel made no express and particular objection thereto. (He did move for a new trial and in arrest of judgment at the end of the trial, which motions were denied.)

In 1948, the Illinois Supreme Court ruled, in what appears to be an *obiter dictum*, that it would assume that a defendant had waived his right to separate trials of disassociated felonies there being nothing in the record showing that he had objected to "consolidation of the two indictments for trial." (*The People* v. *Skaias* (1948), 398 Ill. 478; 76 N.E. 2d 455.)(1)

In 1949 the court in what was clearly an *obiter dictum*, stated that where a defendant's counsel had joined in a stipulation that he might be tried for two separate offenses,

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(1) In the case at bar there was no consolidation of indictments but intermingling of the trials.

he could not attack the procedure as error on appeal. (*The People* v. *Dieckman* (1949), 404 Ill. 161; 88 N.E. 2d 433.) The court in *Dieckman* cited only its own opinion in *Skaggs* as authority.

But in 1934 the Illinois Supreme Court had held that defendant could not be forced to trial upon two unrelated felonies in the same proceedings because its criminal cases proceeded as at common law and the mode of trial had not been changed by Statute. (*People* v. *Wolf*, 358 Ill. 334; 193 N.E. 211) The court clearly implied that such a dual proceeding deprived defendant of a fair and impartial trial. Then, in 1953, the court, citing only *Wolf* as authority held that it is a *cardinal principle* of Illinois law "that a defendant *cannot* be tried for two separate and distinct felonies, which are wholly and totally unrelated, at the same time." *People* v. *Stinetta*, 414 Ill. 308; 111 N.E. 2d 548.

This United States Supreme Court has judicially recognized its power and its duty to compel obedience by State Courts of procedural safeguards of due process. *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472; *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205; *Wolf* v. *Colorado*, 338 U.S. 25, 69 S. Ct. 1359; *Chessman* v. *Teets*, 354 U.S. 156, 77 S. Ct. 1127. It has employed its power and accepted its responsibility under the due process clause of the Fourteenth Amendment to compel State Courts to observe that fundamental fairness in criminal trials essential to the very concept of justice. *Adamson* v. *California*, 332 U.S. 46, 67 S. Ct. 1682, 92 L. Ed. 1903; *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205; *Moore* v. *Holohan*, Warden, 294 U.S. 103; *Thompson* v. *Louisville*, 80 S. Ct. 624; *Napue* v. *Illinois*, 79 S. Ct. 1173.

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(2) Italics ours.

360 U.S. 264; *In Re Oliver*, 68 S. Ct. 499, 333 U.S. 257, *Chambers* v. *Florida*, 309 U.S. 227, 60 S. Ct. 472.

It has been held that no waiver by a defendant that goes so far as to deny him due process can be effectual. *Simons et al* v. *United States* (1941), C.C.A. 9th Cir. 119 F. 2d 539, 544. This holding seems just, desirable and necessary to the maintaining of fair criminal trial procedures, beyond question.

This Supreme Court is not bound by the evaluations of fairness made by the Illinois Court, but may in the exercise of its jurisdiction under the Fourteenth Amendment make its own evaluation of the fairness or unfairness of the proceeding as shown by the record. *Nagac* v. *Illinois*, 79 S. Ct. 1173, 360 U.S. 264.

For the reason that the procedure in the case at bar deprived defendant of a basic and fundamental right, and because it left the proceeding bare of a universally recognized safeguard of his right to be tried by a fair and impartial court in a fair proceeding within limits allowed by the Fourteenth Amendment, and because this basic right should not be allowed to be and cannot be waived by mere failure of defendant's lawyer to object to the court's deprivation of the fundamental and basic right to traditional procedural safeguard of being put to defend only one disassociated felony in one proceeding, the writ of certiorari should issue.

Respectfully submitted.

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APPENDIX.

Opinion of the Supreme Court of Illinois

Docket No. 36412 — Agenda 20 — September, 1961

Mr. Chief Justice Bristow delivered the opinion of the court:

In trials before the criminal court of Cook County without a jury, defendant, Richard Woods, was found guilty under three different indictments and was sentenced to the Illinois State Penitentiary for a term of one to ten years on each indictment with sentences to run concurrently. A writ of error has been sued out of this court and the cause is here for review.

The Cook County grand jury, in four indictments, charged the defendant with rape, assault to rob, and robbery. Indictment 60 2408 was for rape. Indictment 60 2405 was for assault to rob, and indictments 60 2406 and 60 2407 were for robbery. The assault to rob and the robbery indictments arose from a single transaction. The indictment for rape arose from a separate disassociated transaction. The trials under the four different indictments were held before the same judge. The trial court first heard the evidence under the indictment for rape and then that case was recessed. Upon resuming the first trial, the court called up indictment 60 2406 for hearing, recessed that trial upon completion of evidence, then hearing indictment

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This opinion was prepared by the late Mr. Chief Justice Bristow, and is adopted and filed as the opinion of the court.

(Opinion)

60-2406, recessing upon completion of evidence, and then hearing indictment 60-2407. The evidence in indictments 60-2405, 60-2406, and 60-2407 was presented solely by the use of stipulations. After hearing evidence under indictment 60-2407 the court entered a verdict of not guilty of the rape charge but found the defendant guilty under each of the other indictments.

Application for probation by defendant's counsel was denied, the court stating that the presence of violence controlled his decision.

It is the defendant's contention on appeal that the trial of the disassociated felonies at the same time, with the intermingling of testimony concerning one with that of the others, and with disposition of all offenses at the same time was error of such a nature as to render the trials so unfair as to require reversal on appeal. The rule of law that a defendant cannot be forced to trial upon disassociated felonies is not questioned by this court. (*People* v. *Stingley*, 414 Ill. 398, *People* v. *Wolf*, 358 Ill. 334.) No doubt exists that the charge under indictment 60-2408 for rape was in no way connected with the charges under the robbery indictments, but no objection to the procedure used in hearing these different cases was made. An objection cannot be made for the first time on appeal and the error complained of will not be given credence in seeking grounds for a new trial. *People* v. *Curaness*, 21 Ill. 2d 46, *People* v. *Stevens*, 11 Ill. 2d 21, *People* v. *Ruben*, 366 Ill. 29, *People* v. *Nye*, 349 Ill. 172, and *People* v. *Buonicconti*, 340 Ill. 299.

We have held that a court on review will not consider the question whether, if objections had been made or

raised, a different result would have been reached. (*People* v. *Ney*, 349 Ill. 172.) The fact that the evidence was heard without a jury and was conclusive in establishing the guilt under the robbery indictments must be given weight in determining the fairness of the defendant's trial.

The defendant's appeal is not interpreted as contending that trial counsel was so incompetent that a new trial is required, and if such a contention had been made it would be rejected. A trial counsel will not be deemed incompetent because the value he placed on certain errors or procedural methods was reassessed by different counsel on appeal. *People* v. *Clark*, 7 Ill. 2d 163, *People* v. *Ney*, 349 Ill. 172.

Defendant's contention that the trial court erred in allowing a trial where evidence was introduced by stipulations is not tenable. Trial counsel will not be judged other than competent because of his use of a stipulation of evidence where that method of setting forth evidence may have seemed more desirable. Counsel for a defendant in a criminal action may, if he thinks it to be "for the best interest of his client, stipulate the facts to which the People's witnesses will testify." (*People* v. *Rosco*, 388 Ill. 480, 482.) Citing *People* v. *Pierce*, 387 Ill. 608, and *People* v. *Malin*, 372 Ill. 422, this court stated in *People* v. *Pelk*, 19 Ill. 2d 310, 315, that "The law is well established that an accused may, by stipulation, waive the necessity of proof of all or part of the case which the People have alleged against him. Having done so, he cannot complain of the evidence which he has stipulated into the record."

The transcript of record in this case has been carefully examined and the facts as shown thereby justify the convictions on each indictment. The argument on the part of

the defendant which sets forth the contention that the trial court was confused as to the presence or absence of evidence of violence is without merit. The stipulation in 60-2406 provided that Johnnie Mae Ward would testify: "He was holding a revolver in his hand, bluish in color. I told the defendant I didn't have any money and at this point he pulled Carmelita Murphy and hit me with his hand. I then give the defendant ten cents U.S. currency. He forced us all to walk down the street, with the gun. Miss Digby started to cry and he hit her with his hand, knocking her to the ground." No objection is made to this part of the stipulation. Other parts of the stipulation indicate the presence of facts which the trial court could call violence and there is no reason to believe that the court was confused in the disposition of the charges before it. The refusal to allow the petition for probation was within the discretion of the trial court. Ill. Rev. Stat. 1959, chap. 38, par. 785.

The judgments are affirmed.

Judgments affirmed.